IN THE MICHIGAN SUPREME COURT

Appeal from the Court of Appeals
Wilder, P.J., and Boonstra and O'Brien, JJ.

DENISHIO JOHNSON,

Plaintiff-Appellant,

v

CURT VANDERKOOI, ELLIOT BARGAS, and CITY OF GRAND RAPIDS,

Defendants-Appellees.

Supreme Court No. 156057
Court of Appeals No. 330536
Lower Court No. 14-007226-NO

KEYON HARRISON,

Plaintiff-Appellant,

v

CURT VANDERKOOI and CITY OF GRAND RAPIDS,

Defendants-Appellees.

Supreme Court No. 156058
Court of Appeals No. 330537
Lower Court No. 14-002166-NO

PLAINTIFFS' REPLY BRIEF IN SUPPORT OF THEIR JOINT APPLICATION FOR LEAVE TO APPEAL

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Leave should be granted because this civil rights appeal raises critical issues that should be resolved by this Court, namely:

- Under *Monell*, can a municipality insulate itself from liability for its unconstitutional policies if those policies authorized, but did not require, its police to engage in unconstitutional conduct?

- As part of a *Terry* stop, can police require citizens who are not carrying identification, but who identify themselves, to submit to the taking of their fingerprints and photographs absent probable cause or a warrant, and then keep that information on file indefinitely?

- Given the profound impact that age has on a juvenile's ability to understand, exercise, and appreciate his or her right to refuse consent to a search, should courts take age into account when determining whether consent is voluntary?

Plaintiffs-Appellants are hard-pressed to understand how these issues, involving the proper application of the U.S. Constitution, are somehow not important to this state's jurisprudence nor of significant public interest. These issues affect not only Plaintiffs but all others who might sue a municipality for deprivation of constitutional rights, or who might be fingerprinted by police simply because they are not carrying identification.

Perhaps implicitly recognizing that the potentially wide-ranging impact of these issues favors granting leave to appeal, Defendants-Appellees also argue that this Court cannot even hear the Fourth Amendment issues because the U.S. Supreme Court has yet to decide them. To the contrary, state court decisions about such unresolved issues are often exactly how these kinds of matters are properly resolved. Michigan's courts cannot simply decline to decide constitutional issues because there is no U.S. Supreme Court decision on point, nor need this Court wait for federal guidance about what the Fourth Amendment requires.[1]

[1] Defendants also assert that Plaintiffs are substantively incorrect on this or that legal position. Plaintiffs will only address those disagreements here to the extent that they're relevant to whether this Court should grant leave to appeal. As to Defendants' other substantive legal positions, Plaintiffs will respond when doing so is appropriate: the merits brief.

I. The Court of Appeals' Holding Directly Conflicts with the U.S. Supreme Court's Decisions and Threatens To Eviscerate the *Monell* Standard for Municipal Liability—As Even Defendants Appear to Concede.

The Court of Appeals was incorrect as a matter of law in holding that there was no municipal liability because the City of Grand Rapids authorized its police to take photographs and fingerprints (P&Ps) for identification purposes but did not require them to do so. The most striking aspect of Defendants' Answer is that they seem to agree with Plaintiffs on the facts and the law, although they draw a different conclusion. Defendants essentially admit that the Court of Appeals' decision could be interpreted as conflicting with the U.S. Supreme Court's decisions, yet they argue that this Court should not grant leave because other Michigan courts will refuse to follow the Court of Appeals' published decision on municipal liability. To the contrary, this Court should grant leave precisely because of this admitted conflict.

Under *Monell v Department of Social Services*, 436 US 658 (1978), a § 1983 claim for municipal liability lies when a government body "*sanction[s]* or order[s]" unconstitutional conduct. *Pembaur v City of Cincinnati*, 475 US 469, 480, 480 (1986) (emphasis added). Further, lower court decisions applying the *Monell* and *Pembaur* line of cases have confirmed that municipalities are liable for policies that authorize unconstitutional conduct even when they do not require such conduct. See, e.g., *Garner v Memphis Police Dep't*, 8 F3d 358, 360, 364-65 (CA 6, 1993); Pls' Joint Appl at 23-24. Defendants adopt a similar reading of these cases. See Defs' Answer at 21 ("[E]ven under the cases Plaintiffs cite in support of their argument, a police officer's discretion to act within the scope of an unconstitutional policy does not absolve the municipality of liability.").

In fact, Defendants appear to agree with many of Plaintiffs' arguments about municipal liability. For example, Defendants agree that the City has a longstanding policy of authorizing its police to take photographs and fingerprints (P&Ps) during *Terry* stops for identification

purposes. Defs' Answer at 10. Defendants further agree that the Court of Appeals' rejection of Plaintiffs' municipal liability claim under *Monell* hinged on the fact that the City's policy did not *require* police to take P&Ps in all such stops, but rather authorized P&Ps to be used. See Defs' Answer at 13, 14.

Defendants even agree that "municipal liability does not depend on whether an individual officer acting pursuant to [municipal authorization for certain conduct] retains some level of discretion in deciding whether or not to engage in that conduct in a particular situation." See Pls' Joint Appl at 17; Defs' Answer at 21. Indeed, turning to cases interpreting *Monell*, Defendants adopt a position identical to that of Plaintiffs: "it is possible for a court to conclude that an unconstitutional policy is the moving force behind a constitutional injury even when the officers have the discretion as to how to apply the policy[.]" Defs' Answer at 22.

But Defendants refuse to follow these points of agreement to their logical conclusion. This problem arises because the Court of Appeals took the opposite position from that of *Monell*, *Pembaur*, and later cases: it denied municipal liability precisely as a result of the City's officers' discretion to decide when to take P&Ps during *Terry* stops. Because the Court of Appeals' decision is published and binding on future courts and litigants, its holding has the potential to eviscerate the *Monell* liability standard throughout the state and insulate municipalities from liability for policies that explicitly authorize their police officers to violate the Constitution.

Defendants effectively acknowledge that the Court of Appeals' decision conflicts with U.S. Supreme Court decisions, or could be interpreted as such. See Defs' Answer at 23. Thus, Defendants are in the uncomfortable posture of defending a lower court decision that favored their litigation position but which they appear to concede is wrong on the law. To square this circle, they argue that Plaintiffs' concerns are overblown because lower courts would never

actually follow the appellate court's erroneous interpretation of municipal liability that effectively trumps the Supreme Court's jurisprudence in this area: "it would be reversible error for a trial court of this state to rely on one outlier opinion authored by a State Court of Appeals." *Id.*

Defendants hedge by suggesting that the Court of Appeals' decision could be interpreted as not conflicting with U.S. Supreme Court precedents on *Monell* liability. At a minimum, however, if even the prevailing party below is unsure about how to interpret the Court of Appeals' published opinion about municipal liability, then subsequent litigants and lower courts are likely to be equally uncertain.[2] This Court should thus take the opportunity to address the issue and provide the needed guidance about when and how municipalities can be held liable for constitutional torts in Michigan.

II. The Fourth Amendment Issues Confronting this Court Raise Significant Issues for Michigan Law and the Public Interest.

A. This Court Can Decide Federal Constitutional Issues that the U.S. Supreme Court Has Not Yet Decided.

Defendants attempt to strip this Court of the ability to address the Fourth Amendment issues that this case squarely presents. See Defs' Answer at 2-3, 23, 26-27. In doing so, Defendants invoke a principle derived from *Oregon v Hass*, 420 US 714 (1975). But as that case and its progeny make clear, the *Hass* principle applies only when the U.S. Supreme Court has *actually held something* under the federal Constitution. In other words, a state court may not interpret a federal constitutional provision to provide greater protections than the U.S. Supreme

[2] *Monell* has been cited 77 times in Michigan state courts according to Westlaw, as of August 15, 2017. Plaintiffs are unsure why Defendants limited their cherry-picked factoid about this to seven published cases after 2000. See Defs' Answer at 23. Regardless, the many future courts that will be obligated to follow the Court of Appeals' opinion as binding authority will be well-served by guidance from this Court about the scope of *Monell* liability.

Court has said it provides. That is not the case here, where both parties agree that the U.S. Supreme Court has not decided the specific Fourth Amendment issues presented.[3]

In *Hass*, for example, the Supreme Court had previously *held* that a criminal defendant's credibility could properly be impeached by prior conflicting statements, even though those prior statements were otherwise inadmissible in the prosecution's case-in-chief because they were obtained in violation of *Miranda v Arizona*, 384 US 436 (1966). *Hass*, 420 US at 721-22 (explaining the *holding* of *Harris v New York*, 401 US 222 (1971)). The state court decided to the contrary, prohibiting the defendant's trial testimony from being impeached by prior inconsistent but inadmissible-under-*Miranda* statements. *Id.* at 720. The Supreme Court concluded that its earlier decision in *Harris* was indistinguishable from the facts before it. *Id.* at 722. As a result, and despite the defendant's argument that the state court was free to interpret the federal constitution more expansively than the Supreme Court had, *id.* at 719, the Court noted that the proper "balance had been struck in *Harris*, and we are not disposed to change it now." *Id.* at 723; see also *Arkansas v Sullivan*, 532 US 769, 772 (2001) (relying on *Hass* to foreclose the state supreme court's attempt to circumvent the U.S. Supreme Court's earlier holding about where the boundaries between constitutional and unconstitutional police behavior should be drawn).

[3] Or, at least, Defendants usually appear to take this position. E.g., Defs' Answer at 2, 24-25. On one occasion, however, the Defendants repeat an error they made below, asserting that the Supreme Court had interpreted an earlier case as holding that fingerprints are not protected by the Fourth Amendment. *Id.* at 29; Def/Appellee's Br on Appeal (*Harrison v Vanderkooi*) at 16-17 (purporting to describe *United States v Dionisio*, 410 US 1, 14 (1973), and *Davis v Mississippi*, 394 US 721 (1969)). As has already been pointed out in the briefing below, see Amicus Curiae Br at 25-26 n 21, the quotation erroneously described by Defendants as a statement of the *Dionisio* Court is actually from the *dissent*. See *Dionisio*, 410 US at 39 (MARSHALL, J., dissenting).

In contrast, the various U.S. Supreme Court cases about fingerprinting have struck no balance at all. Instead, the Court has declined to weigh the arguments as to whether fingerprinting is a search or whether fingerprinting is proper as part of a *Terry* stop.[4] The case before this Court puts the undecided Fourth Amendment issues into stark relief. As described at length in Plaintiffs' Application and elsewhere in this Reply, these are issues of great importance to Michigan law and the public. Nothing in *Hass* prevents this Court from deciding them.

Indeed, previous decisions of this Court have recognized the Court's ability to reach issues that the U.S. Supreme Court has not decided. For example, in *J & J Construction Co v Bricklayers & Allied Craftsmen, Local 1*, 468 Mich 722, 729; 664 NW2d 728 (2003), this Court addressed "whether the private-figure and public-figure dichotomy embodied in defamation case law on freedom of speech and freedom of the press from the United States Supreme Court extends to defamation involving the right to petition." That the U.S. Supreme Court had never been squarely presented with or decided this issue did not prevent this Court from reaching it. See *id.*

Defendants' position would effectively limit "novel questions of federal constitutional law," Defs' Answer at 2, to only being decided in the first instance by federal courts—unless, that is, a state court that wishes to address the issue is prepared to confine its decision within the parameters of prior U.S. Supreme Court dicta. Nothing obligates state courts to do so, however, and any such restriction would downplay the important role that states play under our system of

[4] The U.S. Supreme Court has not decided whether fingerprinting is a search or whether and under what circumstances fingerprints can be taken as part of a *Terry* stop. Plaintiffs are not aware of any cases where the general *Hass* principle has precluded a state court from deciding, on federal constitutional grounds, to provide more protection under the Fourth Amendment than arguably might be suggested by U.S. Supreme Court *dicta* on the subject.

federalism in interpreting the U.S. Constitution and protecting federal constitutional rights in state fora.[5]

As a practical matter, state courts often are called upon to decide cases involving unresolved questions of federal law. For example, due to changes in technology or police methods, or simply the wide variety of factual circumstances in which police interact with citizens, criminal cases often require deciding whether a search is constitutional despite the lack of clear authority on point from the U.S. Supreme Court. Trial courts cannot simply refuse to decide those cases; they must make decisions about undecided federal questions. And, of course, this Court has the ability to review any such decision. In sum, the *Hass* principle is inapplicable and does not bar this Court from addressing the Fourth Amendment issues raised by Plaintiffs.

B. Defendants' Failure to Explain How Fingerprinting or Photographing was within the Permissible Scope of the Stops Confirms the Need for this Court to Address the Proper Scope of a *Terry* Stop.

In response to Plaintiffs' argument that fingerprinting and photographing Harrison and Johnson exceeded the permissible scope of the stops, Defendants state that it was permissible to dispel the reasonable suspicion that led to the stops without actually explaining how fingerprinting or photographing would have done so.[6] This conclusory assertion is insufficient to

[5] Many U.S. Supreme Court cases assessing whether police practices pass constitutional muster have reached that Court only after first progressing through the state courts. See, e.g., Wayne A. Logan, *A House Divided: When State and Lower Federal Courts Disagree on Federal Constitutional Rights*, 90 N Dame L Rev 235, 254-57 (2014) (collecting cases).

[6] Defendants confuse matters when they equate Fourth Amendment searches and the investigative methods that police can use as part of a *Terry* stop. See Defs' Answer at 31. The two are not equivalent. Searches under *Terry* are limited to patdown frisks for officer safety. See, e.g., *People v Champion*, 452 Mich 92, 99; 549 NW2d 849 (1996) ("*Terry* strictly limits the permissible scope of a patdown search to that reasonably designed to discover [weapons] that could be used to assault an officer.") Taking fingerprints is a Fourth Amendment search that is not permissible as part of a *Terry* stop unless an exception to the Fourth Amendment's probable cause and warrant requirements applies. Defendants fail to articulate how fingerprinting in circumstances like those raised here fits within any other category of permissible warrantless

demonstrate that this Court should not grant leave to appeal to address this issue of significant public interest and involving legal principles of major significance.[7]

While verifying identity in the course of the stop is permissible, Defendants fail to acknowledge that there is no requirement that individuals substantiate their identity through any particular means. See *Hiibel v Sixth Judicial Dist Court*, 542 US 177, 186 (2004). Instead, Defendants assert that, "in the absence of identification, the officers . . . relied on the least intrusive means available to confirm Plaintiffs' identities: a photograph and fingerprint." Defs' Answer at 32. The actual "least intrusive means available" was what officers had already done—ask the teens for their names, which they provided. Even if asking the teens' names was not sufficient to establish their identities—which it was—Defendants also fail to explain how verifying the teens' identities through fingerprinting or photographing would "establish or negate the suspect's connection with *that* crime." See *Hayes v Florida*, 470 US 811, 817 (1985). Finally, Defendants acknowledge that Plaintiffs' argument regarding the retention of the photographs and fingerprints is novel, Defs' Answer at 36, which confirms that it is an issue of significant public interest that should be addressed by this Court.

C. The Effect of Age on a Juvenile's Ability to Consent is an Issue of Significant Public Interest, and the Court's Failure to Consider its Impact Would Result in Material Injustice to Harrison and Other Juveniles in Similar Circumstances.

Surprisingly, Defendants essentially ignore Plaintiffs' argument that Harrison was a juvenile, and that Harrison's age had significant bearing on the voluntariness of his consent.

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searches. In contrast, asking questions about a person's identity or other matters related to the *Terry* stop is not per se a search, but rather an investigative method that is not improper so long it is the least intrusive means available to confirm or deny the suspicions that gave rise to the stop.

[7] Defendants' assertion that Plaintiffs have waived the argument regarding the scope of the *Terry* stop is similarly flawed, as Plaintiffs raised this argument in the Court of Appeals. See, e.g., Harrison's Br on Appeal at 18-19; Johnson's Br on Appeal at 11-12.

Defendants assert that "Harrison has also failed to show how disturbing the lower court holdings would benefit anyone other than himself." Defs' Answer at 39. To the contrary, whether Harrison gave valid consent is of significant public interest because the trial court's failure to consider the totality of the circumstances, particularly Harrison's age, causes material injustice not only to Harrison but also to other juveniles who may be asked or told to consent to a search. For example, this issue affects juveniles subjected to the P&P policy, as they may be too young to carry a driver's license, may not have the resources necessary to obtain a driver's license or other identification, or may live in areas where obtaining a license when reaching the appropriate age is not a priority because other transportation methods are readily available. Similarly, this issue also affects juveniles asked or told to consent in other contexts where the Fourth Amendment applies, such as to the search of a person, home, vehicle, or other belongings.

The Supreme Court's jurisprudence makes clear that the effect of age on the ability to consent is an issue of significant public interest. The Supreme Court has explained "[t]ime and time again" that juveniles "often lack the experience, perspective, and judgment to recognize and avoid choices that could be detrimental to them." *JDB v North Carolina*, 564 US 261, 272 (2011) (citations omitted). Despite this, the trial court failed to take Harrison's age and his other personal characteristics into account in determining whether he consented. This caused the court to err in determining whether Harrison's statements were properly interpreted as consent, as well as whether the City met its burden to show that Harrison's consent was given freely and voluntarily. Instead, the trial court "should have required the City to establish that Harrison's consent was voluntary in spite of his age." Defs' Answer at 40. This was not a fact-finding error only affecting Harrison, but instead an error about what the law should require, which potentially affects all juveniles who find themselves in a similar position. Because the impact of age on

ability to consent is an issue of significant public interest impacting more than just Harrison, this Court should grant leave to appeal.

CONCLUSION

For the reasons set forth above and in their initial brief, Plaintiffs-Appellants respectfully request that this Court grant their application for leave to appeal.

Respectfully submitted,

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